

PS/CD

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GERALD SMITH,

Petitioner,

v.

20-CV-06620 FPG
ORDER

ANTHONY ANNUCCI, Acting
Commissioner of DOCCS, et al.,

Respondents.

Pro se Petitioner, Gerald Smith, is a prisoner incarcerated at the Monroe County Jail. He has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. ECF No. 1.

DISCUSSION

The filing fee for a petition for a writ of habeas corpus is \$5.00. 28 U.S.C. § 1914(a). Whenever a prisoner submits a petition for a writ of habeas corpus, the prisoner must either (1) pay the filing fee or (2) submit a motion to proceed *in forma pauperis*. Under 28 U.S.C. § 1915(a)(1), the *in forma pauperis* motion must include an affidavit or affirmation establishing that the petitioner is unable to pay the fees and costs for the proceedings. It also must include a prison certification section, completed and signed by an authorized officer of the institution in which the prisoner is incarcerated, certifying both the amount presently on deposit in the prisoner's inmate trust account and the prisoner's average account balance during the last six months.¹ 28 U.S.C. § 1915(a)(1)-(2).

¹ The Court has ordered that a form motion to proceed *in forma pauperis* with supporting affirmation be mailed to the petitioner. The form also is available at <http://www.nywd.uscourts.gov/pro-se-forms>.

Here, Petitioner did not pay the \$5.00 filing fee nor did he submit a motion to proceed *in forma pauperis* with a prison certification of his inmate trust fund account, *see* 28 U.S.C. § 1915(a)(1)-(2).

CONCLUSION

For the reasons set forth above, the Clerk of Court shall administratively terminate the Petition without prejudice. Petitioner is granted leave to move to re-open, no later than **thirty days from the date of this Order**, by either (1) paying the filing fee (\$5.00) or (2) submitting a motion to proceed *in forma pauperis* that establishes Petitioner's inability to pay fees and costs and that includes a completed and signed prison certification section.²

ORDER

IT IS HEREBY ORDERED that the Clerk of Court shall administratively terminate this action without prejudice without filing the Petition or assessing a filing fee; and it is further ORDERED that the Clerk of Court shall send to Petitioner a form motion to proceed *in forma pauperis*; and it is further

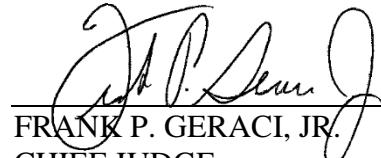
ORDERED that if Petitioner wishes to re-open this action, he shall so notify this Court, in writing, no later than **thirty days from the date of this Order**; Petitioner's writing shall include either (1) a motion to proceed *in forma pauperis* that establishes his inability to pay fees and costs and that includes a completed and signed prison certification section, or (2) the \$5.00 filing fee; and it is further

² Such an administrative termination is not a "dismissal" for purposes of the statute of limitations, and if the case is re-opened under the terms of this order, it is not subject to the statute of limitations time bar if it was originally filed timely. *See Houston v. Lack*, 487 U.S. 266 (1988) (prisoner mailbox rule); *McDowell v. Delaware State Police*, 88 F.3d 188, 191 (3d Cir. 1996); *see also Williams-Guice v. Bd. of Educ.*, 45 F.3d 161, 163 (7th Cir. 1995).

ORDERED that upon Petitioner's submission of either (1) a motion to proceed *in forma pauperis*, or (2) the \$5.00 filing fee, the Clerk of Court shall re-open this case.

SO ORDERED.

Dated: August 25, 2020
Rochester, New York



FRANK P. GERACI, JR.
CHIEF JUDGE
UNITED STATES DISTRICT COURT